apology — or the plaintiff badly, as for instance by provoking the defendant, or defaming him in return."

In our judgment, there was no misdirection by Chua J. in arriving at the award of $130,000. We are also of the opinion that the award is not only not excessive but is reasonable having regard to all the circumstances of the case. It was a grave slander perpetrated deliberately and not only without regard to the truth but knowing that it was untrue. It was perpetrated for political gain not caring what distress it would cause and what harm it would inflict on the personal and political reputation of an incumbent prime minister.

Finally, we turn to deal with a ground on appeal raised in the Petition of Appeal and which is based on section 16 of the Defamation Act (Cap. 32). This ground reads as follows:—

"*(D) Damages*

(viii) The trial judge erred in law in failing to take into consideration that the plaintiff had already obtained judgment for a total of $310,000 for slander of him to the same effect uttered by others."

Section 16 of the Defamation Act, which is in identical terms with section 12 of the Defamation Act, 1952 of England, reads as follows:—

"16. In any action for libel or slander the defendant may give evidence in mitigation of damages that the plaintiff has recovered damages or has brought actions for damages, for libel or slander in respect of the publication of words to the same effect as the words on which the action is founded, or has received or agreed to receive compensation in respect of any such publication."

At the trial of the action no evidence was given in mitigation of damages as required by section 16 and it would appear from the record that section 16 was not raised on behalf of Mr. Jeyaretnam for consideration of Chua J. In *Lewis* v. *Daily Telegraph Ltd.* and *Lewis* v. *Associated Newspapers Ltd.*[4] similar libels were published in two national newspapers on the same day and each had to be dealt with by a different jury. Lord Reid said (page 261):—

"If each jury were to award damages without regard to the fact that the plaintiffs are also entitled to damages against the other newspaper, the aggregate of the damages in the two actions would almost certainly be too large. Section 12 of the Defamation Act, 1952, is intended to deal with that. In effect it requires that each jury shall be told about the other action, but the question is what each jury should be told. I do not think it is sufficient merely to tell each jury to make such allowance as they may think fit. They ought, in my view, to be directed that in considering the evidence submitted to them they should consider how far the damage suffered by the plaintiffs can reasonably be attributed solely to the libel with which they are concerned and how far it ought to be regarded as the joint result of the two libels. If they think that some part of the damage is the joint result of the two libels they should bear in mind that the plaintiffs ought not to be compensated twice for the same loss. They can only deal with this matter on very broad lines and they must take it that the other jury will be given a similar direction. They must do the best they can to ensure that the sum which they award will fully compensate the plaintiffs for the damage caused by the libel with which they are concerned, but will not take into account that part of the total damage suffered by the plaintiffs which ought to enter into the other jury's assessment."

In all the circumstances this ground of appeal must also fail.

In the result, the appeal is dismissed with costs.

*Appeal dismissed.*

Solicitors: *Hilborne & Co.; Drew & Napier.*

# A MALAYSIAN REPORTS

## PUBLIC PROSECUTOR v. MUNUSAMY

**[F.C. (Suffian L.P., Raja Azlan Shah C.J. (Malaya) and Hashim Yeop A. Sani J.) May 8 and June 29, 1979]**

**[Kuala Lumpur — Federal Court Criminal Reference No. 4 of 1978]**

*Criminal Law and Procedure — Issuing certificate required by law to be given knowing it to be false — Whether special pass issued under Immigration law a certificate required by law — Reference of question of law to Federal Court — Disposal of appeal — Courts of Judicature Act, 1964, s. 66(5) — Penal Code, s. 197.*

*Penal Code, s. 197 — Issuing false certificate — Special pass under Immigration Act, 1963.*

*Immigration — Special pass — Issuance of — Immigration Act, 1963 — Penal Code, s. 197.*

In this case the respondent had been convicted of a charge under section 197 of the Penal Code in that he issued a Special Pass which was to his knowledge false in a material particular. On appeal to the High Court the appeal was allowed on the ground that the Special Pass was not a certificate required by law to be given. On application by the Public Prosecutor the learned Judge referred the following question to the Federal Court:

"Whether a special pass issued under regulation 14(3) of the Immigration Act, 1963 . . . is a certificate required by law to be given within the meaning of section 197 of the Penal Code. . . ."

**Held:** (1) the special pass issued in the circumstances of this case, where the Immigration authorities believed that the traveller was the holder of a Malaysian passport, was a certificate required by law to be given or signed within section 197 of the Penal Code;

(2) the whole case may be argued as an appeal before the Federal Court to ascertain whether the conviction was correct.

*Cases referred to:-*

(1) *Government of Malaysia* v. *Loh Wai Kong* [1979] 2 M.L.J. 33.

(2) *Public Prosecutor* v. *Dr. G.J.N. D'Fonseka* [1958] M.L.J. 102.

(3) *Chua Sin Teng and others* v. *Public Prosecutor* [1963] M.L.J. 207.

(4) *Sim Tiew Bee* v. *Public Prosecutor* [1973] 2 M.L.J. 200.

(5) *Yue Sang Cheong Sdn. Bhd.* v. *Public Prosecutor* [1973] 2 M.L.J. 77.

(6) *Attorney-General for Northern Ireland* v. *Gallagher* [1963] A.C. 349.

The following cases were also referred to in argument — *Kulasingam* v. *Public Prosecutor* [1978] 2 M.L.J. 243; *Oh Keng Seng* v. *Public Prosecutor* [1976] 2 M.L.J. 9; *Mohamed bin Musa* v. *Public Prosecutor* [1972] 1 M.L.J. 161; *Sevak J. Bhogilal* v. *Temple Committee* 1925 A.I.R. P.C. 155; *Lee Kee Choong* v. *Empat Nombor Ekor (N.S.) Sdn & Others* [1976] 2 M.L.J. 93, 95; *Baikunti Missir* v. *Narindra Sundari Debi* 1917 Pat. 697; *Yoong Hock Pin* v. *Public Prosecutor* [1977] 1 M.L.J. 178.

FEDERAL COURT.

*Faidz Mohamed Darus* (Deputy Public Prosecutor) for the applicant.

*V.K. Palasuntharam* for the respondent.

*Cur. Adv. Vult.*

**Suffian L.P.** (delivering the judgment of the Court): The accused was convicted of a charge under section 197 of the Penal Code as follows:

"That you on March 1, 1975 at about 4.30 p.m. at the Melaka Airport Immigration Checkpoint, in the District of Melaka Tengah, in the State of Melaka, issued a Certificate, to wit, a Special Pass No. 136844, which is required by law to be

given and knowing that such certificate is false in a material point, to wit, that Madam Mariaie is a holder of Malaysian Passport, and that you have thereby committed an offence under section 197 and punishable under section 193 of the Penal Code."

His appeal was allowed by the High Court simply on one ground, namely that the Special Pass, the subject of the charge, was not in the learned judge's view a certificate "required by law to be given".

On application by the Public Prosecutor, the learned judge acting under section 66 of the Courts of Judicature Act No. 7 of 1974, reserved for the decision of this court the following question of law of public interest which arose in the course of the appeal and the determination of which by the judge affected the event of the appeal:

"whether a special pass issued under regulation 14(3) of the Immigration Act, 1963 (Laws of Malaysia Act 155) is a certificate required by law within the meaning of section 197 of the Penal Code, F.M.S. Cap. 45."

Section 197 of our Penal Code which reads:

"Whoever issues or signs any certificate required by law to be given or signed, or relating to any fact of which such certificate is by law admissible in evidence, knowing or believing that such certificate is false in any material point, shall be punished in the same manner as if he gave false evidence."

is the same as section 197 of the Indian Penal Code, and according to *Ratanlal* on the Law of Crimes, 22nd edition, page 517, the ingredients of the offence under the section are

1. Issuing or signing of a certificate —
   (a) required by law to be given or signed, *or*
   (b) relating to a fact of which such certificate is by law admissible as evidence.
2. Such certificate must have been issued or signed knowing or believing that it is false in a material particular.

We agree with *Ratanlal*. So the prosecution has to prove ingredients *either* 1(a) and 2 *or* 1(b) and 2, not ingredient 1(a) and 1(b) and ingredient 2. It would appear that the prosecution here relied on ingredients 1(a) and 2. In the lower court there was much discussion of ingredient 1(b), all of it irrelevant.

Only ingredient 1(a) is material in this reference.

The case for the prosecution was that on March 1, 1975, at 4.50 p.m. Immigration Officer Quah Boon Huat was on duty at the Malacca Airport checkpoint clearing passengers arriving from Singapore, including an Indian lady, one Mariaie. The accused had also arrived from Singapore by the same plane. While Quah was still clearing the passengers, the accused (himself head of Immigration in Malacca) came to the checkpoint and instructed him to issue a Special Pass to the lady. The accused told him that the lady had a Malaysian passport, which information was accepted by Quah in the Special Pass (exhibit P6) which he wrote out. He then asked the accused to sign P6. The accused refused saying that as Quah was on duty he should sign it. Quah felt he had to do so as the accused was his superior officer. Quah signed and handed it to the accused. It was later discovered that the lady had an Indian, not a Malaysian passport.

The Special Pass P6 reads as follows:

"*ORIGINAL* *IMMIGRATION REGULATIONS 1963*
SPECIAL PASS No: 136844
[Regulation 14(3)]

To: MADAM MARIE PERUMAL (F) Acc. by one male and one Female Child.

Holder of Malaysian Passport passport/internal travel document No:..... issued at ..... on .....*(which has been retained).

You are hereby permitted to enter remain in West Malaysia for a period of 14 days from the date of issue hereof for the purpose of Reporting to the Ketua Pejabat Imigeresen Melaka for clearance.

Date of issue March 1, 1975
Valid till March 15, 1975.

Sd: ?
for Controller of Immigration."

Special Passes are dealt with in regulation 14 of the Immigration Regulations, 1963, made under section 54 of the Immigration Ordinance, 1959, and published as L.N. 228/63.

Regulation 14 reads as follows:

"14.(1) A Special Pass may be issued by the Controller to any person if the Controller considers the issue of such a Pass desirable —

(a) in order to afford an opportunity of making enquiry for the purpose of determining whether such person is entitled to an Entry Permit or is otherwise entitled to enter the Federation, Sabah or Sarawak under the provisions of the Ordinance or of these Regulations, or whether such person is a prohibited immigrant; or

(b) in order to afford such person a reasonable opportunity of prosecuting an appeal under the provisions of the Ordinance against any decision of the Controller; or

(c) for any other special reason.

(2) A Special Pass shall entitle the holder thereof to enter the Federation, Sabah or Sarawak (as the case requires) or remain therein for such period, not exceeding one month, as may be stated in such Pass:

Provided that the Controller may, from time to time, extend such period.

(3) A Special Pass shall be in the Form 16 set out in the Second Schedule hereto, or in the form of an endorsement on the passport or internal travel document of the applicant, as the Controller may determine.

...."

The arguments of Mr. Palasuntharam on behalf of the accused may be summarized as follows: if an Immigration Officer refuses to issue a Special Pass he cannot be compelled by order of *mandamus* to issue it, as it is within the discretion of the executive to issue or not to issue a Special Pass to an alien (see *Government of Malaysia etc.* v. *Loh Wai Kong*,[1] where this court held that the issue of a passport even to a citizen is discretionary), that the Immigration Officer at the most is only *authorised* by regulation 14 to issue a Special Pass in certain circumstances, that never can it be said that he is *required* by law to do so to an alien, and so the Special Pass is not a certificate required by law to be given within section 197 of the Code.

Mr. Palasuntharam further cited *Public Prosecutor* v. *Dr. G.J.N. D'Fonseka*[2] and *Chua Sin Teng & Ors.* v. *Public Prosecutor*.[3]

Buhagiar J. said at page 104 when delivering the judgment of the Malayan Court of Appeal in *D'Fonseka*, that the requirement in section 197

"refers not to the production of a certificate but to the *obligation* imposed on somebody to give or sign a certificate,

such as, to take an obvious example, a certificate of the registration of a company given by the Registrar of Companies on whom a *duty* is imposed by *law* to issue such a certificate."

There the accused signed a false medical certificate which an E.P.F. contributor showed to the E.P.F. authorities with a view to withdrawing the money standing to his credit, and it was held that there was nothing in the E.P.F. Ordinance and in the rules thereunder *requiring* the accused as a matter of law to issue a medical certificate and therefore the accused was not guilty of an offence under section 197.

Five years later the same question was considered by the Court of Appeal, in the second case cited, *Chua,* this time in relation to a certificate by a driving tester in the Road Transport Department that a Mr. Lee had passed a driving test. The certificate, which was false, was passed to the appropriate functionary in the office of the Registrar of Motor Vehicles in Seremban and in consequence Mr. Lee was issued with a driving licence. Thomson C.J., as he then was, who delivered the judgment of the court, after examining the law relating to driving tests concluded that according to the law such a certificate should be furnished not by the tester who conducted the test but by the Registrar, and that accordingly the certificate by the driving tester that Mr. Lee had passed the driving test was not a certificate which is "required by law to be given or issued" within the meaning of section 197 of the Penal Code.

There it will be observed that rule 10(1) of the Motor Vehicles (Driving Licence) Rules, 1959, provides that—

"any person passing the test *shall* be furnished with a certificate. . . ."

so that when a driver has passed his examination there *is* a legal obligation on the part of the Registrar of Motor Vehicles to issue a certificate and accordingly a certificate so issued by him becomes one required by law to be given or issued. The accused was however held not guilty under section 197 because the certificate was required to be given not by him but by the Registrar.

Thus it is clear that it is essential that to come within section 197 there must be an *obligation,* a *duty,* imposed by *law* on somebody to issue the certificate.

Is there an obligation, a duty, imposed by law on somebody to issue the special pass?

In our view the answer to this depends on the facts of each case.

Here the facts, as already stated, are that the accused told Quah that the lady had a Malaysian passport and his subordinate Quah believed him. Now, the holder of a Malaysian passport is *prima facie* a Malaysian citizen and, under article 9(1) of the Constitution, entitled to enter and remain in the country. If a traveller who enters Malaysia claims to be a citizen and there is some doubt as to his citizenship and Immigration refuses to issue him a Special Pass so that he may enter the country and satisfy Immigration that he is a citizen — may not the court compel Immigration by *mandamus* to issue him a special pass? We are of the opinion that in circumstances such as existed in this *particular* case the court may do so. Here Immigration believed the lady was the holder of Malaysian passport. In our judgment whether Immigration so believed honestly or dishonestly, in such circumstances the Department would be under a legal duty to issue a Special Pass, notwithstanding the use of the word "may" in the first line of the regulations; for even where the executive has a discretion, in our opinion that discretion must be exercised in accordance with law, not arbitrarily and capriciously. As stated in *Loh Wai Kong, supra,* the executive

"must act *bona fide,* fairly, honestly and honourably."

If it is established that Immigration, despite believing that the traveller like this lady holds a Malaysian passport, refuses to issue her a special pass, clearly then it is acting *mala fide* and has abused its discretionary power. In these circumstances, on principles well established and fully set out in the two authoritative books mentioned in our judgment in that case, the court may review Immigration's action and by *mandamus* compel them to issue a Special Pass, which after all is not conclusive as to the traveller's citizenship.

In our judgment the special pass issued in the circumstances of this case was a certificate required by law (to be given or signed) within section 197 of the Penal Code.

It should, however, be emphasized that our answer is limited to the facts in this particular case where Immigration believed that the traveller was the holder of a Malaysian passport, and does not necessarily extend to cases where the facts are different.

In the lower court reference was made to the definition in section 2(1) of the Immigration Ordinance, 1959, of certificate as meaning—

"any Certificate of Status issued under the provisions of any regulations made under section 54 [of the Ordinance];"

and to regulation 3 of the Immigration Rules, 1963, which deals with Certificates of Status.

We do not think that such references are helpful, because the definition is good only *for the purposes of the Immigration laws:* whereas the accused here was charged under the Penal Code and the meaning of certificate has to be elicited from the Code.

Before leaving this matter, brief mention should be made of Mr. Palasuntharam's preliminary objection that we had no jurisdiction to entertain this reference because, he argued, the charge was in relation to an offence alleged to have been committed under the Immigration *Ordinance* on March 1, 1975, whereas the question posed refers to the Immigration *Act,* 1963, which came into force on May 1, 1975, two months after the date of the alleged offence and we had no power to amend the question. We do not think there is any merit in the objection. It is true that the question incorrectly refers to the Act, but as it correctly refers to the relevant regulation, we are of the opinion that the error is immaterial and does not deprive us of jurisdiction.

Mr. Palasuntharam submitted that if our answer to the question posed is yes, he has the right nevertheless to re-open the whole matter as if this was a regular appeal and in support he quoted subsection (5)

of section 66 of the Courts of Judicature Act which provides:

"The Federal Court shall hear and determine the question reserved and may make such orders as the High Court might have made as it may consider just for the disposal of the appeal."

He also cited the following cases: *Sim Tiew Bee* v. *Public Prosecutor;*[4] *Yue Sang Cheong Sdn. Bhd.* v. *Public Prosecutor;*[5] and *Attorney-General for Northern Ireland* v. *Gallagher.*[6]

We agree that the whole case may now be re-argued as a regular appeal by Mr. Palasuntharam to satisfy us that the conviction by the learned Magistrate was wrong.

*Order accordingly.*

Solicitor: *V.K. Palasuntharam.*

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## PUBLIC PROSECUTOR v. MOHAMED NOOR BIN JANTAN

**[F.C. (Suffian L.P., Lee Hun Hoe C.J. (Borneo), Chang Min Tat, Syed Othman & Ibrahim Manan F.JJ.) May 14 & July 12, 1979]**

**[Kuala Lumpur — Federal Court Criminal Reference No. 5 of 1978]**

*Criminal Law and Procedure — Cautioned statement — Whether defence entitled to ask prosecution to tender cautioned statement as evidence during course of case for prosecution — Recording officer called as witness may be required to produce statement — Cautioned statement to be marked as defence exhibit if introduced at instance of defence — No trial within trial necessary if defence does not challenge voluntary nature of statement — Internal Security Act, 1960, s. 75.*

In this case at the trial of the respondent on a charge under the Corrosive and Explosive Substances and Offensive Weapons Ordinance, 1958, the prosecution elected not to use a cautioned statement that had been recorded from the respondent. The statement was however admitted at the request of the defence, over the objection of the prosecution, and marked as a prosecution exhibit. The respondent was subsequently acquitted. The learned judge on the application of the Public Prosecutor reserved the following questions of law for the determination of the Federal Court;

"(1) Whether or not the defence is entitled in law to cause the prosecution to tender as evidence the cautioned statement recorded from the accused person during the course of the case for the prosecution when the prosecution does not intend to introduce it as part of the prosecution case?

(2) If the answer to question (1) is in the affirmative, whether the cautioned statement should be marked as a defence exhibit?

(3) Whether or not a trial within a trial should in law be held before the cautioned statement could be admitted as evidence at the insistence of the defence during the course of the case for the prosecution when the voluntariness of the making of the cautioned statement is not disputed by the defence?"

**Held:** (1) the prosecution is not obliged to tender the statement if it does not itself wish to use it during the trial. If the prosecution does not call the recording officer, the prosecution cannot be compelled to tender the statement in evidence. The accused may however call the recording officer to prove the statement, as part of his case;

(2) if the recording officer is called by the prosecution, the defence must, if it relies on the statement, put to the officer whether or not he had recorded a statement from the accused; and if he answered yes and refused to produce the statement at the request of the defence, he could be ordered by the court to produce it, which order it would be contempt of court for him to disobey;

(3) if the defence succeeds in having the cautioned statement tendered in evidence during the course of the case for the prosecution, it should be marked as a defence not as a prosecution exhibit;

(4) no trial within a trial need be held before the statement is admitted in evidence at the instance of the defence if its voluntary nature is not disputed.

**[Editorial Note:** The following authorities were referred to at the hearing of the reference:- *Lim Ah Tong* v. *Public Prosecutor* [1948-49] M.L.J. Supp. 159 and *Yue Sang Cheong Sdn. Bhd.* v. *Public Prosecutor* [1973] 2 M.L.J. 77.]

FEDERAL COURT.

*Mah Weng Kwai* (Deputy Public Prosecutor) for the applicant.

*R.R. Sethu* for the respondent.

*Cur. Adv. Vult.*

**Suffian L.P.** (delivering the judgment of the Court): The accused was charged as follows:

"That you on June 25, 1974 at about 2.50 p.m. at No. 16, Hale Road, in the City of Kuala Lumpur, did have in your possession an offensive weapon, to wit a 'Kerambit' knife otherwise than with lawful authority, and that you have thereby committed an offence punishable under section 6(1) of the Corrosive and Explosive Substances and Offensive Weapons Ordinance No. 43/58."

During his trial the prosecution elected not to use a cautioned statement that had been recorded from him. While the recording officer was being cross-examined, defence counsel applied to get him to produce the statement, relying on section 75 of the Internal Security Act, 1960. Over the objection of the prosecution officer, it was admitted and marked as Exhibit P2, not be it noted as a defence exhibit.

After PW2 had finished his evidence the prosecution closed its case and defence counsel submitted no case to meet. The learned President agreed and acquitted and discharged the accused.

On appeal the High Court upheld the acquittal.

On application by the Public Prosecutor, the learned judge acting under section 66 of the Courts of Judicature Act reserved for our decision the following questions of law of public interest which had arisen in the course of the appeal and the determination of which had affected the event of the appeal:

"(1) Whether or not the defence is entitled in law to cause the prosecution to tender as evidence the cautioned statement recorded from the accused person during the course of the case for the prosecution when the prosecution does not intend to introduce it as part of the prosecution case?

(2) If the answer to question (1) is in the affirmative, whether the cautioned statement should be marked as a defence exhibit?

(3) Whether or not a trial within a trial should in law be held before the cautioned statement could be admitted as evidence at the insistence of the defence during the course of the case for the prosecution when the voluntariness of the making of the cautioned statement is not disputed by the defence?"

Let two things be noted about the first question. First, it asks whether the *prosecution* is obliged at the instance of the defence to tender as evidence the cautioned statement. Secondly, it asks whether the prosecution is so obliged during the course of *the case*